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Supreme Court, U.S.
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No. 07-

IN THE
SUPREME COURT OF THE UNITED STATES

SCOTT D. HILDRETH,
Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in determining if Hildreth was entrapped as a matter of law, the court of appeals erred in not considering whether the Government proved that Hildreth's predisposition was independent and not the product of the attention that the Government had directed at him.

PARTIES TO THE PROCEEDING

The parties are Scott D. Hildreth and the United States of America.

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit affirming the denial of Hildreth's motion for a judgment of acquittal is published at 485 F.3d 1120 (10th Cir. 2007) and is printed in the Appendix ("App.") at App. 3a.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit affirmed the denial of Hildreth's motion for a judgment of acquittal as to one count of possessing a machinegun in violation of 18 U.S.C. § 922(o)(1) on May 14, 2007. A timely petition for rehearing was denied on June 5, 2007. Justice Breyer extended until November 2, 2007 the time within which to file this petition. This Court has jurisdiction under 28 U.S.C. § 1254(l).

STATUTE

> Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

18 U.S.C. § 922(o)(1).

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

Hildreth was indicted on two counts of knowingly possessing a machine gun in violation of 18 U.S.C. § 922(o)(1). Count One alleged that Hildreth possessed a Polish AKM machinegun and Count Two

alleged that he possessed a MAC 10. The jury returned a verdict of guilty on Count One and not guilty on Count Two. Hildreth filed a motion for a judgment of acquittal on the ground that he was entrapped as a matter of law, which the district court denied. After calculating an advisory Guidelines range of 27 to 33 months' imprisonment, the court imposed a sentence of three years' probation. Hildreth appealed the denial of his motion for a judgment of acquittal, arguing that he was entrapped as a matter of law and that the district court should have granted his motion; the Government cross-appealed the sentence.

The court of appeals affirmed the district court's denial of Hildreth's motion for a judgment of acquittal, holding that Hildreth was not entrapped as a matter of law, but vacated the sentence and remanded for resentencing. On resentencing, Hildreth was sentenced to 27 months' imprisonment.

(ii) Statement of Facts

The Government's evidence showed the following.

In January, 2004, ATF Special Agent James Patterson, using an assumed name, contacted Hildreth because Hildreth had firearms for sale on the internet. Trial Transcript at 221. Patterson purchased a lawfully possessed Valmet M78 rifle from Hildreth. *Id.* at 225.

Patterson again contacted Hildreth in early May, 2004 and Hildreth told him that he had an "M11 A1, 380 caliber open bolt firearm for sale for $1,200." *Id.* at 213. The firearm was described as "a rare gun" and was semi-automatic, although "you could manipulate the trigger by taking a nickel behind the trigger . . . ." *Id.* at 214. Patterson went to Hildreth's home on May 7, 2004, where they went into the garage. Patterson told Hildreth about a (fictional) friend who had a firearm that fired from an open bolt that could be converted to fire to full automatic. *Id.* at 230. Hildreth then showed Patterson an M11 A1 RPB Industries open bolt firearm and explained to Patterson that, because it fired from an open bolt, "it could be a dangerous weapon." *Id.* at 216. Hildreth also explained to Patterson that:

> [I]f you placed two nickels behind the trigger and tape them there with electrical tape, it would put the trigger in what is considered to be the sweet spot so the gun would fire in a full auto capacity, if the nickels were placed in the proper location.

Id. at 217.

Hildreth then affixed two nickels behind the trigger with medical tape. *Id.* at 218. After Hildreth removed the tape and the nickels, Patterson purchased the firearm for $1,200. *Id.* at 217.

On September 27, 2004, Sergeant Delilah Stahl of the Kansas City Police Department, using an assumed name, contacted Hildreth by phone at the request of ATF Special Agent Wesley Williamson. She was posing as a widow who wished to sell ten (10) of her late husband's firearms. *Id.* at 285. During the phone conversation, Stahl did not describe the types of firearms and did not tell him that any of them was machinegun. *Id.* at 135-136, 304.

On September 29, Stahl contacted Hildreth again and arranged for him to meet her at her home (which was actually an ATF undercover facility wired for video and audio). *Id.* at 288. Hildreth arrived at the house on September 30 and inspected the 10 firearms, which were each wrapped in a sock or a towel, and placed in a box. *Id.* at 289. One of the firearms was a MAC 10 and one was a Polish AKM. Hildreth manipulated the bolt and trigger of the MAC 10 and informed Stahl that it was not a machinegun, that it was a semi-automatic. *Id.* at 310. As Hildreth inspected each firearm, he placed it on the floor or on the couch, except for the AKM, which he placed back into the box. *Id.* at 311, 389. Hildreth made notes on a yellow pad about each firearm, including the price he would pay for it and the price for which he expected to sell it. *Id.* at 289. With respect to the AKM, he offered to pay $600. *Id.* at 473.[1]

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[1] Williamson was asked on cross examination about the market value of the AKM. He testified that, "[t]o be legally sold, I would guess about 5,000. In the illegal market, anywhere from

Stahl told Hildreth that, before she could sell the firearms to Hildreth, she needed to allow her (fictional) brother-in-law to look at the firearms and possibly purchase them. *Id.* at 312. Hildreth "wanted her to call [her] brother-in-law and see if may be [she] wouldn't have to transport the guns back, just keep them there." *Id.* at 290. She "was adamant that [she] had to go back and at least show them to him." *Id.* at 290. Stahl told Hildreth that she wanted to sell all the firearms together, that it was all or nothing. *Id.* at 313, 390.

Hildreth believed that the AKM was a machinegun. *Id.* at 391, 442. Hildreth told Stahl that owning machineguns was illegal and told her that she 'could be arrested and fined $50,000 and spend many years in jail just for possessing" them. *Id.* at 290. He also told her that he "could not own a machine gun" (*Id.* at 3140, but that he had a friend in Newton, Kansas who was a "Class 3 [machinegun] firearm dealer" and that he (Hildreth) was "going to have his friend in Newton – he was going to come get it from him . . . ." *Id.* at 315.[2] Hildreth "made clear to [Stahl]

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200 to 5,000." *Id.* at 160. Williamson was then asked if the AKM "were sold legally on the market it's worth about 12- to $14,000, isn't it?" He responded: "I don't know." *Id.* at 160.

[2] Hildreth's friend was Dan Pillow, whom ATF confirmed was a Class 3 [machinegun] firearms dealer in September, 2004. *Id.* at 356-57. Pillow testified (as a Government witness) that he provided a copy of his federal firearms license to Hildreth so that Hildreth could conduct interstate firearms transactions. *Id.* at 493-94.

that he couldn't own it, he couldn't possess it, his friend would pick it up . . . ." *Id.* at 315. After Hildreth offered Stahl $3,150 for all the firearms, Stahl said she would call Hildreth after she had met with her brother-in-law. *Id.* at 316. Hildreth then left the house. *Id.* at 291.

Stahl called Hildreth on October 4 and arranged to call him the next morning as her brother-in-law could not come up with the money to buy the firearms. *Id.* at 293. Stahl called Hildreth the next morning about 9 a.m. and Hildreth told her that he had a golf game at 10 a.m. and that he would come to the house before the game. *Id.* at 318. When Hildreth returned to the undercover house, on October 5, Stahl asked him "are you sure you want all these guns?" and he said he did. *Id.* at 295. Hildreth paid Stahl $3,150 in cash and took the box with all the firearms in it. *Id.* at 295. Hildreth did not open the box before he took it. *Id.* at 320. Hildreth was arrested after he drove away from the house.

In October, 2003, prior to the above events, Hildreth had purchased an M 14 rifle at a gun show for $900, which, at the time of purchase, he believed was a semi-automatic rifle. *Id.* at 431. The next day, having "second thoughts about the rifle and its legal status" (*Id.*), he returned with it to the show, where he was informed that it was considered to be a machinegun. *Id.* at 432. He, therefore, promptly sold it to a dealer at the show for $800. *Id.* at 432.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISION IN *JACOBSON* AND DECISIONS OF OTHER CIRCUITS

1) The court of appeals stated that the entrapment defense:

> has two elements: "first, government agents must have *induced* the defendant to commit the offense; and second, the defendant must not have been otherwise *predisposed* to commit the offense, given the opportunity." (citation omitted).

Appendix ("App.") at 9a.

Further, the court of appeals held that predisposition is:

> the "defendant's inclination to engage in the illegal activity for which he has been charged, i.e., that he is ready and willing to commit the crime." (citation omitted). The defendant's predisposition "may be shown by evidence of similar prior illegal acts or it may be inferred from [the] defendant's desire for profit, his eagerness to participate in the transaction, his ready response to the government's inducement offer, or his demonstrated knowledge or experience in

> the criminal activity." (citation omitted).

App. at 10a.

Finally, the court of appeals held that predisposition:

> must "be viewed at the time the government agent first approached the defendant," but "inferences about that predisposition may be drawn from events occurring after the two parties came into contact." (citation omitted).

Id.

2) While the last statement above, *i.e.*, that "'inferences about that predisposition may be drawn from events occurring after the two parties came into contact,'" is not incorrect as far as it goes, it is incomplete and thus in conflict with *Jacobson v. United States,* 503 U.S. 540 (1992) and decisions of four other circuits. It is to resolve this conflict that this Court should grant this petition.

In *Jacobson*, this Court held that, where the defendant presents evidence of entrapment:

> the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.

503 U.S. at 549.

In a footnote, this Court noted:

> [T]he proposition that the accused must be predisposed prior to contact with law enforcement officers is so firmly established that the Government conceded the point at oral argument, submitting that the evidence it developed during the course of its investigation was probative because it indicated petitioner's state of mind *prior* to the commencement of the Government's investigation.

503 U.S. at 554, n.2.

Jacobson further explained that the Government must prove that a defendant's predisposition "was independent and not the product of the attention that the Government had directed" at the defendant. 503 U.S. at 550.

Accordingly, while *Jacobson*'s footnote supports the court of appeals' holding that "'inferences about that predisposition may be drawn from events occurring after the two parties came into contact' (citation omitted)" (App. at 9a), the court of appeals' holding does not limit the "events occurring after the two parties came into contact" to events that were "independent and not the product of the attention that the Government had directed" at the defendant. 503 U.S. at 550.

Four other circuits which have considered this question have limited the "events occurring after the

two parties came into contact" to events which were independent.

In *United States* v. *Squillacote*, 221 F.3d 542 (4th Cir. 2000), the Fourth Circuit stated:

> While *Jacobson* requires that the defendant's disposition to commit the crime must be "independent of the Government's acts," 503 U.S. at 554, *Jacobson* does not prohibit the consideration of actions occurring after the defendant was contacted by the government when determining whether the defendant was predisposed to commit the crime.

221 F.3d at 565.

Similarly, the Fifth Circuit held:

> [T]he crucial holding of *Jacobson* is that *predisposition must be independent of government action.* Evidence of the defendant's ready response to the solicitation, as well as evidence of independently motivated behavior that occurs after government solicitation begins can be used to prove that the defendant was predisposed . . . .

United States v. *Byrd*, 31 F.3d 1329, 1336 (5th Cir. 2000)(emphasis added).

In *United States* v. *Poehlman*, 217 F.3d 692 (9th Cir. 2000), the Ninth Circuit stated:

> If, after the government begins inducing a defendant, he makes it clear that he would have committed the offense even without the inducement, that would be evidence of predisposition. *But only those statements that indicate a state of mind untainted by the inducement are relevant to show predisposition.*

217 F.3d at 704-05 (emphasis added).

In *United States* v. *Aibejeris*, 28 F.3d 97 (11th Cir. 1994), the Eleventh Circuit held:

> *Jacobson* holds that the government must prove at trial beyond a reasonable doubt that the defendant was actually predisposed to commit the underlying crime *absent the government's role in assisting such commission.*

28 F.3d at 99 (emphasis added).

Accordingly, the court of appeals' decision in the case at bar is in conflict with this Court's decision in *Jacobson* and the decisions of four other circuits.

3) Application by the court of appeals in the case at bar of the *Jacobson* predisposition standard, as adopted by the Fourth, Fifth, Ninth, and Eleventh Circuits, would have compelled the conclusion, "viewing all the evidence and drawing all reasonable

inferences in the light most favorable to the government," *United States v. Garcia,* 182 F.3d 1165, 1168 (10th Cir.1999), that Hildreth was not predisposed to have illegally possessed the AKM machinegun.

The court of appeals based its holding that Hildreth was predisposed to possess the AKM machinegun illegally on several factors. All but the last two factors should not have been considered under the *Jacobson* predisposition standard.

First, the court of appeals stated: "During Mr. Hildreth's meetings with Officer Stahl, he appeared eager to participate in the transaction." App. at 9a-10a. Assuming that, in referring to "the transaction," the court of appeals was referring to the transfer of the AKM and not the other firearms (eight of which were indisputably lawful to possess),[3] there is nothing in the record that indicates that, prior to the first meeting with Stahl and independent of her actions, Hildreth was "eager" to possess a machinegun in general (or the AKM in particular).

On the contrary, the Government's evidence was that, at the first meeting (when Hildreth learned of the AKM), Hildreth told Stahl that owning machineguns was illegal and told her that she "could be arrested and

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[3] *Jacobson* held that "evidence that merely indicates a generic inclination to act within a broad range, not all of which is criminal, is of little probative value in establishing predisposition." 503 U.S. at 550.

fined $50,000 and spend many years in jail just for possessing" them. Hildreth also told Stahl that he "could not own a machine gun" and that he had a friend in Newton, Kansas who was a "Class 3 [machinegun] firearm dealer" and who was "going to come get [the AKM] from him . . . ." In fact, Hildreth "made clear to [Stahl] that he couldn't own it, he couldn't possess it, his friend would pick it up . . . ."

The evidence concerning Hildreth's actions *after* he examined the AKM, *e.g.*, that Hildreth offered Stahl $3,150 for all the firearms on September 30, or that, when Hildreth returned to the undercover house on October 5, Stahl asked him "are you sure you want all these guns?" and he said he did, may not be considered for purposes of determining Hildreth's predisposition since those actions were not "independent," but were "the product of the attention that the Government had directed" at Hildreth. *Jacobson*, 503 U.S. at 550.

Second, the court of appeals also found Hildreth to have been predisposed to possess a machinegun because, "[e]ven after he identified one of the weapons as an illegal machine gun," he:

> offered to pay in cash for all the guns and urged Officer Stahl not to transport the guns back to Kansas City so that her brother-in-law could examine them.

App. 10a.

Once again, this evidence is "the product of the attention that the Government had directed" at

Hildreth. *Jacobson*, 503 U.S. at 550. It is thus not "independent" evidence of predisposition and should not have been considered by the court of appeals.

The third factor relied upon by the court of appeals was that Stahl testified that, before she gave Hildreth the guns, "she asked him whether he was sure that he wanted *all* the guns and he responded affirmatively." App. 10a. As with the above factors, this too is "the product of the attention that the Government had directed" at Hildreth and is thus not "independent" evidence of predisposition which the court of appeals should have considered. *Jacobson*, 503 U.S. at 550.

The fourth factor noted by the court of appeals was that a "jury could also infer a desire for profit from the fact that Mr. Hildreth purchased a $14,000 machine gun for $600." App. at 10a. Aside from the fact that the Government offered no evidence that the market value of the AKM was $14,000,[4] this evidence too is "the product of the attention that the Government had directed" at Hildreth and is thus not "independent" evidence of predisposition. *Jacobson*, 503 U.S. at 550.

The only evidence the Government introduced which actually related to predisposition, *i.e.*, that was "independent and not the product of the attention that

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[4] Williamson testified that, "[t]o be legally sold, I would guess about 5,000. In the illegal market, anywhere from 200 to 5,000."

the Government had directed" at Hildreth (*Jacobson*, 503 U.S. at 550), concerned: i) "an earlier transaction during which a different undercover government agent purchased a gun from Mr. Hildreth" and ii) Hildreth's having "previously purchased and sold a firearm that he thought might be a machine gun at a gun show." App. at 10a.

With respect to the earlier transaction involving the agent, the court of appeals stated that Hildreth:

> sold [the agent] a firearm and that, during the transaction, Mr. Hildreth demonstrated how the gun's trigger could be manipulated to make the gun function as a fully automatic weapon.

App. at 10a.

More precisely, the agent testified that Hildreth showed him an M11 A1 RPB Industries open bolt firearm and explained that, because it fired from an open bolt, "it could be a dangerous weapon." Hildreth also explained to the agent that:

> [I]f you placed two nickels behind the trigger and tape them there with electrical tape, it would put the trigger in what is considered to be the sweet spot so the gun would fire in a full auto capacity, if the nickels were placed in the proper location.

Id. at 217.

Hildreth then affixed two nickels behind the trigger with medical tape. After Hildreth removed the nickels, Patterson purchased the firearm for $1,200.

There was no evidence that Hildreth desired to possess a machinegun unlawfully and such cannot, as a matter of law, be inferred merely from the fact that Hildreth had knowledge that an otherwise lawfully possessed firearm could be converted to a machinegun. Indeed, the fact that Hildreth removed the tape and the nickels and sold the firearm indicated that he did not have any intention to possess it unlawfully.

With respect to Hildreth's having "previously purchased and sold a firearm that he thought might be a machine gun at a gun show" (App. at 10a), the only evidence came from the cross examination of Hildreth, who testified that, in October, 2003, he had purchased an M 14 rifle at a gun show for $900, which, at the time of purchase, he believed was a semi-automatic rifle. The next day, having "second thoughts about the rifle and its legal status," he returned with it to the show, where he was informed that it was considered to be a machinegun. He, therefore, promptly sold it to a dealer at the show for $800.

Far from showing predisposition to possess a machinegun unlawfully, Hildreth's prompt sale of the M 14, at a financial loss, upon learning that it might be a machinegun, demonstrates that Hildreth was predisposed *not* to possess a machinegun unlawfully.

In short, contrary to the court of appeals' holding, if the evidence of predispostion is limited as required by *Jacobson*, and the remaining evidence is viewed in the light most favorable to the government, there is no evidence that proved beyond a reasonable doubt that Hildreth was predisposed to possess a machinegun unlawfully.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

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November, 2007

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
Cross-Appellant,

v.

Nos. 06-3070
and 06-3112

SCOTT D. HILDRETH,

Defendant-Appellant.
Cross-Appellee.

ORDER

Filed June 5, 2007

Before **TACHA**, Chief Circuit Judge, **BALDOCK**,, and **LUCERO**, Circuit Judges

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These matters are before the court on "Appellant/Cross Appellee's Motion Claiming Ineffective Assistance of Legal Counsel", and his "Motion for Clarification of Former Motion and Motion

for Reconsideration of January 9, 2007 Motion." Those motions are denied.

In addition, we also have before us Appellant/Cross Appellee's petition for rehearing. That petition is denied.

We note the petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service requested that the court be polled, the en banc suggestion is likewise denied.

Entered for the Court
ELISABETH A. SHUMAKER,
Clerk
by: [Signature]
Deputy Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee/
Cross - Appellant,

v. Nos. 06-3070,
06-3112

SCOTT D. HILDRETH,

Defendant-Appellant/
Cross - Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D. Ct. No. 05-CR-10016-WEB)

Submitted on the briefs *:

Scott D. Hildreth filed a brief pro se.

D. Lee McMaster, Wichita, Kansas, for the Defendant-Appellant/Cross-Appellee.

Eric F. Melgren, United States Attorney, and Brent I. Anderson, Assistant United States Attorney, Office of the United States Attorney for the District of Kansas, Wichita, Kansas, for the Plaintiff-Appellee/Cross-Appellant.

Before **TACHA**, Chief Circuit Judge, **BALDOCK**, and **LUCERO**, Circuit Judges.

TACHA, Chief Circuit Judge.

Defendant-Appellant Scott D. Hildreth was charged with two counts of knowingly possessing a machine gun in violation of 18 U.S.C. § 922(*o*). The jury returned a verdict of guilty on Count One and not guilty on Count Two. After calculating an advisory Guidelines range of 27 to 33 months' imprisonment, the court imposed a sentence of three years' probation. On appeal, Mr. Hildreth challenges his conviction, and

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* After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

the Government challenges the sentence imposed as unreasonable. We take jurisdiction under 28 U.S.C. § 1291, affirm Mr. Hildreth's conviction, vacate his sentence, and remand for resentencing.

I. BACKGROUND

In July 2004, Mr. Hildreth ran an advertisement in the local newspaper offering to buy and sell guns. The following September, an undercover officer named Dee Stahl contacted Mr. Hildreth. She claimed to be recently widowed and asked whether he would be interested in purchasing her late husband's gun collection. Mr. Hildreth expressed interest and met with Officer Stahl at an undercover government residence on September 30, 2004, to inspect the guns. At the meeting, Officer Stahl presented Mr. Hildreth with a box containing ten guns and explained that she wanted to sell the entire collection in one transaction. Mr. Hildreth inspected each of the weapons and identified one of them as an illegal machine gun.[1] He warned Officer Stahl that she could be arrested, fined, and jailed for owning the machine gun. Officer Stahl explained that she could not immediately finalize any deal because she needed to drive to Kansas City in order to give her brother-in-law an opportunity to inspect and buy the guns. Mr. Hildreth commented that Officer Stahl might consider calling her brother-

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[1] The collection offered by Officer Stahl contained two firearms that the Government alleged to be machine guns. Count One of the superceding indictment charged Mr. Hildreth with possession of a Polish AKM machine gun, and Count Two charged him with possession of an RPB Industries, M10 .45 caliber machine gun. As noted above, the jury found Mr. Hildreth guilty on Count One and not guilty on Count Two.

in-law rather than driving back to Kansas City with the guns in order to avoid the risk of being caught with a machine gun. Ultimately, Mr. Hildreth offered to purchase all the guns, including the weapon he identified as an illegal machine gun, for $3,150 in cash. Unbeknownst to Mr. Hildreth, this entire meeting was videotaped. A few days later, on October 5, Mr. Hildreth met Officer Stahl at the same residence and gave her the $3,150 in cash in exchange for the guns. He was arrested soon after he left the house with the guns.

The jury convicted Mr. Hildreth of knowingly possessing the Polish AKM and acquitted him of the second count involving the M10. After the jury returned its verdict, Mr. Hildreth moved the District Court for judgment of acquittal, arguing that the evidence at trial established his defense of entrapment as a matter of law. The District Court denied the motion, finding that a rational jury could conclude that Mr. Hildreth was not entrapped based on the evidence. The court subsequently imposed a sentence of three years' probation. Mr. Hildreth appeals the District Court's denial of his motion for judgment of acquittal, and the Government cross-appeals the court's decision to sentence Mr. Hildreth to three years' probation.

In addition, Mr. Hildreth seeks leave to file a supplemental opening brief, arguing that a previous order of this Court, dated November 20, 2006, granted him leave to do so. The facts related to this request are as follows. In August 2006, Mr. Hildreth submitted a motion seeking leave to file a supplemental *pro se* brief, which this Court received, but did not file, on August 3, 2006. The Government opposed the motion.

On September 19, 2006, the Court received another supplemental brief from Mr. Hildreth entitled "Defendant's Pro Se Response to Government's Cross-Appeal." We struck this *pro se* brief because, at that time, Mr. Hildreth was represented by counsel. The following November, before filing a response and reply brief in this case, Mr. Hildreth's attorney sought leave to withdraw as counsel. In our November 20 order, we granted the attorney's motion to withdraw and then directed that Mr. Hildreth's brief entitled "Defendant's Pro Se Response to Government's Cross-Appeal" be shown as filed as of September 19, 2006. We did so because the order removed Mr. Hildreth's counsel, and he was therefore no longer represented by counsel for purposes of his response and reply brief. We noted that "[t]his directive effectively grants" Mr. Hildreth's August 2006 motion for leave to file a supplemental *pro se* brief. In addition, at the end of the order, we clearly stated that we would proceed on the following briefs: "the opening `Brief of the Appellant' filed July 25, 2006 [by Mr. Hildreth's attorney]; the `Brief of Appellee/Cross-Appellant' filed by the United States on August 18, 2006; the `Defendant's Pro Se Response to Government's Cross-Appeal' which we are now permitting to be filed as the response and reply of the appellant; and any final reply of the United States."

After we issued our order in November, Mr. Hildreth filed both a Motion to Clarify Court Order Dated November 20, 2006, and a Motion to Include Appellant's *Pro Se* Brief, asking that we strike the opening brief filed by his attorney and replace it with the supplemental brief he submitted in August. We now grant his request to clarify the November order, but deny his request to file the supplemental brief he

submitted in August. Mr. Hildreth argues that, because our November order "effectively" granted his August motion to file a supplemental brief, we must file and consider the first supplemental brief he submitted (at the time of his motion). But as explained above, our November order only directed that his *second* supplemental brief be filed because he was no longer represented by counsel for purposes of the response and reply brief. That is, the order "effectively" granted his motion to file a supplemental brief only to the extent he was not represented by counsel. When Mr. Hildreth submitted his first supplemental brief, he was represented by counsel, who had already filed an opening brief. Because he was represented by counsel for purposes of his opening brief, we did not grant him leave to file a supplemental *opening* brief in our November order, and we decline to do so now. *See United States v. Pearl,* 324 F.3d 1210, 1216 (10th Cir.2003) (denying motion to file supplemental *pro se* brief because the defendant was represented by counsel); *United States v. McDermott,* 64 F.3d 1448, 1450 n. 1 (10th Cir.1995) ("[The defendant] also submitted his own briefs, but to the extent that he raises additional issues, we do not address them, invoking our policy of addressing on direct appeal only those issues raised by counsel."); *United States v. Guadalupe,* 979 F.2d 790, 795 (10th Cir.1992) (denying the defendant's motion for leave to file a supplemental brief because he was "represented by thoroughly competent counsel"). To the extent Mr. Hildreth raises additional issues in this brief, we do not address them. We limit the following discussion to issues involving Mr. Hildreth's entrapment defense and the reasonableness of his sentence.

II. DISCUSSION

A. Entrapment as a Matter of Law

Mr. Hildreth claims he is entitled to a judgment of acquittal because undisputed evidence at trial established that he was entrapped as a matter of law. We review de novo a district court's denial of a motion for judgment of acquittal, "viewing all the evidence and drawing all reasonable inferences in the light most favorable to the government." *United States v. Garcia,* 182 F.3d 1165, 1168 (10th Cir.1999). "Entrapment exists as a matter of law only if the evidence of entrapment is uncontradicted. In other words, entrapment as a matter of law exists only when there is undisputed testimony which shows conclusively and unmistakably that an otherwise innocent person was induced to commit the [criminal] act." *United States v. Nguyen,* 413 F.3d 1170, 1177-78 (10th Cir.2005) (citations and quotations omitted) (alteration in original). Furthermore, "[w]hen a jury has found that no entrapment existed, we can alter that finding on legal grounds only where the holding should be made without choosing between conflicting witnesses nor judging credibility." *Garcia,* 182 F.3d at 1168 (quotation omitted). We therefore ask "only whether sufficient evidence exists to support the jury's verdict." *Id.* (quotation omitted).

The entrapment defense has two elements: "first, government agents must have *induced* the defendant to commit the offense; and second, the defendant must not have been otherwise *predisposed* to commit the offense, given the opportunity." *Nguyen,* 413 F.3d at 1178. Once the defense is properly raised, the government must prove beyond a reasonable doubt

that the defendant was not entrapped. *Id.* In the case before us, Mr. Hildreth focuses on the second element, arguing that the Government failed to introduce sufficient evidence of his predisposition to commit the offense. Predisposition is the "defendant's inclination to engage in the illegal activity for which he has been charged, i.e., that he is ready and willing to commit the crime." *Id.* (quotation omitted). The defendant's predisposition "may be shown by evidence of similar prior illegal acts or it may be inferred from [the] defendant's desire for profit, his eagerness to participate in the transaction, his ready response to the government's inducement offer, or his demonstrated knowledge or experience in the criminal activity." *Id.* (quotations omitted). Moreover, predisposition must "be viewed at the time the government agent first approached the defendant," but "inferences about that predisposition may be drawn from events occurring after the two parties came into contact." *Garcia,* 182 F.3d at 1169.

Contrary to Mr. Hildreth's argument, the record contains sufficient evidence that he was predisposed to commit the offense. During Mr. Hildreth's meetings with Officer Stahl, he appeared eager to participate in the transaction. Even after he identified one of the weapons as an illegal machine gun, he offered to pay in cash for all the guns and urged Officer Stahl not to transport the guns back to Kansas City so that her brother-in-law could examine them. In addition, Officer Stahl testified that, before she gave Mr. Hildreth the guns, she asked him whether he was sure that he wanted *all* the guns and he responded affirmatively. A jury could also infer a desire for profit from the fact that Mr. Hildreth purchased a $14,000

machine gun for $600. Moreover, the Government introduced testimony at trial about an earlier transaction during which a different undercover government agent purchased a gun from Mr. Hildreth. The agent testified that Mr. Hildreth sold him a firearm and that, during the transaction, Mr. Hildreth demonstrated how the gun's trigger could be manipulated to make the gun function as a fully automatic weapon. The record also contains evidence that Mr. Hildreth had previously purchased and sold a firearm that he thought might be a machine gun at a gun show. In short, the Government presented evidence that Mr. Hildreth was predisposed to commit the crime. He was not therefore entrapped as a matter of law. *See United States v. Duran,* 133 F.3d 1324, 1335-36 (10th Cir. 1998) ("A defendant is not entitled to a claim of entrapment as a matter of law if the government has presented any evidence to contradict the entrapment defense.").

B. Reasonableness of Mr. Hildreth's Sentence

The Government appeals the District Court's decision to sentence Mr. Hildreth to three years' probation, a sentence below the applicable range under the U.S. Sentencing Guidelines ("Guidelines" or "U.S.S.G."). The court determined that, under the advisory Guidelines, the applicable sentencing range was 27 to 33 months' imprisonment, based on an offense level 18 and a criminal history category I. After recognizing the applicable Guidelines range, the court exercised its discretion under *United States v. Booker,* 543 U.S. 220 (2005), to deviate from the Guidelines and impose a sentence of three years' probation.

We review the District Court's sentencing determination under a reasonableness standard, which is guided by the statutory factors delineated in 18 U.S.C. § 3553(a). *See United States v. Kristl,* 437 F.3d 1050, 1053 (10th Cir.2006). Reasonableness review has both "procedural and substantive components." *United States v. Atencio,* 476 F.3d 1099, 1102 (10th Cir. 2007). In other words, "the reasonableness standard of review set forth in *Booker* necessarily encompasses both the reasonableness of the length of the sentence, as well as the *method* by which the sentence was calculated." *Kristl,* 437 F.3d at 1055. To impose a procedurally reasonable sentence, "a district court must calculate the proper advisory Guidelines range and apply the factors set forth in § 3553(a)." *Atencio,* 476 F.3d at 1102.[2] "A substantively reasonable sentence ultimately reflects the gravity of the crime and the § 3553(a) factors as applied to the case." *Id.* (citing *United States v. Cage,* 451 F.3d 585, 594 (10th Cir.2006)). The Government does not challenge the sentence on procedural grounds, but argues instead that Mr. Hildreth's sentence is substantively unreasonable under our decision *United States v. Cage,* 451 F.3d 585. In *Cage,* we explained that, when a district court

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[2] In addition, to impose a procedurally reasonable sentence outside the advisory Guidelines range, the court must explain the basis for its variance. *See Atencio,* 476 F.3d at 1106 ("Allowing a district court to vary or depart in the absence of such explanation would . . . hinder this court's ability to review the reasonableness of the variance."). We recently noted that, under 18 U.S.C. § 3553(c), a court imposing a sentence outside the Guidelines range must provide a more specific explanation than a court imposing a sentence within the Guidelines. *United States v. Ruiz-Terrazas,* 477 F.3d 1196, 1199-1200 (10th Cir.2007).

imposes a sentence outside the Guidelines, the level of scrutiny we apply in reviewing the sentence depends on the "comparative difference" between the applicable range under the advisory Guidelines and the actual sentence imposed. *Id.* at 594; *United States v. Bishop,* 469 F.3d 896, 907 (10th Cir.2006) ("In considering the discrepancy between the advisory guidelines range and the actual sentence, the comparative difference should guide our review." (quotation omitted)). In other words, the more a district court diverges from the advisory Guidelines range, the more "compelling" its reasons must be for that divergence. *United States v. Valtierra-Rojas,* 468 F.3d 1235, 1240 (10th Cir.2006). The Government argues that the divergence in this case is analogous to the "extreme divergence" in *Cage,* in which the defendant received a sentence of six days' imprisonment, despite an applicable Guidelines range of 46 to 57 months. 451 F.3d at 594. We held that this kind of extreme divergence is reasonable "only under dramatic facts." *Id.*

Since our decision in *Cage,* we have recognized that "there is no formula into which we input the degree of divergence in order to generate precisely how compelling the district court's reasons need be," although "comparison with other cases is a useful tool." *Valtierra-Rojas,* 468 F.3d at 1240. In addition to the divergence in *Cage,* we have held that a 471% upward deviation from a Guidelines maximum of 21 months to a sentence of 120 months' imprisonment is an extreme divergence. *United States v. Mateo,* 471 F.3d 1162, 1170 (10th Cir.2006). By comparison to the divergence in *Cage,* we have held that a 33-month variance from a Guidelines maximum of 27 months to a sentence of 60 months (a 122% increase) is

"substantial,"rather than extreme, and therefore requires "compelling reasons," although "they need not be as `dramatic'" as the reasons supporting an extreme divergence. *Valtierra-Rojas,* 468 F.3d at 1240. And we have described a 37% increase from a Guidelines maximum of 57 months to a sentence of 78 months as "a significant increase that requires sufficient explanation and justification." *Bishop,* 469 F.3d at 908.

Even though the actual sentence of probation in this case resembles the six-day prison sentence in *Cage,* the District Court deviated from a Guidelines minimum of 27 months, whereas the bottom of the applicable range in *Cage* was 46 months. Mindful that we look not only to the percentage of divergence, but also to the "absolute number of months above or below the Guidelines range," *Valtierra-Rojas,* 468 F.3d at 1240, we conclude that the divergence in this case is not extreme, but is nevertheless substantial. *See id.* (holding that a 33-month divergence was substantial rather than extreme even though it constituted a 122% increase from the high end of the applicable Guidelines range). *United States v. Likens,* 464 F.3d 823, 825 (8th Cir.2006) (holding that a divergence from a Guidelines range of 15 to 21 months to a sentence of three years' probation was an "extraordinary reduction" requiring "extraordinary circumstances"); *United States v. Ture,* 450 F.3d 352, 357 (8th Cir.2006) (holding that a divergence from a Guidelines range of 12 to 18 months to two years' probation was an "extraordinary variance"). Because the variance in the case before us is substantial, the District Court's decision must be supported by "compelling reasons." *Valtierra-Rojas,* 468 F.3d at 1240.

In this case, the District Court justified the substantial variance on three grounds: (1) Mr. Hildreth was not involved in the ongoing conduct of buying, selling, or possessing machine guns; (2) he has a record of long-term employment enabling him to support himself and his family; and (3) he poses a low risk of danger to the public because he does not have a history of aggressive, violent, or non-compliant behavior. Although these are proper considerations under § 3553(a), *see* 18 U.S.C. § 3553(a)(1), (2)(A), (2)(C) (requiring the court to consider the nature and circumstances of the offense, the characteristics of the defendant, the seriousness of the offense, and the protection of the public), the Government argues that they are not enough to justify the court's decision and that, if the court had properly weighed other § 3553(a) factors, it would not have imposed a sentence below the applicable range. As we explain below, we agree that the court failed to justify its substantial divergence from the advisory Guidelines.

Although the sentencing Guidelines are now advisory, district courts must consider them in reaching sentencing decisions. *Booker,* 543 U.S. at 264, 125 S.Ct. 738 ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing."). As we have previously explained, the Guidelines are an expression of "Congress's intentions in passing the sentencing laws." *Cage,* 451 F.3d at 593. Consequently, a district court may not "determine `reasonableness' under § 3553(a) without reference to the fact that the Guidelines represent a critical advisory aspect of the § 3553(a) factors." *Id.* at 594. Moreover, a properly calculated Guidelines sentence will typically reflect an

"accurate application of the factors listed in § 3553(a)," *id.* (quotation omitted), including "the need to avoid unwarranted sentencing disparities" under § 3553(a)(6), which we have noted is the purpose of the Guidelines, *see Kristl,* 437 F.3d at 1054 ("[T]he purpose of the Guidelines [is] to promote uniformity in sentencing so as to prevent vastly divergent sentences for offenders with similar criminal histories and offenses." (alteration in original) (quotation omitted)). Indeed, in recognizing the Guidelines' role in promoting uniformity in sentencing, we have held that a sentence within a properly calculated Guidelines range is entitled to a presumption of reasonableness. *See id.*

Here, the District Court essentially ignored the recommendation of the sentencing Guidelines. After determining that the facts of this case do not warrant a departure from the applicable sentencing range, the court concluded that a non-Guidelines sentence of three years' probation sufficiently satisfies the § 3553(a) criteria. But none of the court's reasons supports such a substantial divergence because the reasons do not distinguish Mr. Hildreth or his offense from the ordinary defendant upon which the Guidelines sentence is calculated. Mr. Hildreth's criminal history category under the Guidelines already accounts for the District Court's finding that he poses a low risk of danger to the public due to his lack of an aggressive or violent history. Likewise, the fact that Mr. Hildreth does not seem to be engaged in ongoing criminal activity is already accounted for by the Guidelines. Under the Guidelines, uncharged conduct may serve as a basis for increasing the base level of a sentence, *see* U.S.S.G. § 5K2.21, but the *absence* of

such conduct is not listed as grounds for a departure. This is because the base level for the offense under the Guidelines already reflects Congress's assessment of the seriousness of the offense absent unusual circumstances. Similarly, the fact that Mr. Hildreth is gainfully employed and supports his family financially is not out of the ordinary; indeed, as a matter of policy, the Guidelines discourage courts from considering family ties and responsibilities in sentencing decisions. U.S.S.G. § 5H1.6; *see also* 28 U.S.C. § 994(e) ("The Commission shall assure that the guidelines and policy statements . . . reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."); 18 U.S.C. § 3553(a)(5) (requiring a sentencing court to consider policy statements issued by the Sentencing Commission).

In short, the court did not distinguish Mr. Hildreth from defendants with similar histories convicted of the same crime. *See Mateo,* 471 F.3d at 1169 (interpreting *Cage* to require a determination of "whether the particular characteristics of the defendant . . . are commonplace—and therefore presumably are already part of the Guidelines calculation—or are sufficiently uncommon to justify a divergence from the presumptively reasonable Guidelines sentence"); *see also, e.g., Bishop,* 469 F.3d at 908 (holding that a significant divergence was reasonable when the district court analyzed the defendant's "individualized circumstances using the § 3553 factors" and "link[ed] the variance to the Guidelines themselves"); *Valtierra-Rojas,* 468 F.3d at 1242 (holding that an upward variance based in part

on defendant's extensive history of alcohol abuse was reasonable because the Guidelines calculation did not adequately account for particular behavior). The District Court therefore impermissibly "abandon[ed] the tools provided by the advisory Guidelines" and "import[ed] its own philosophy of sentencing." *Bishop,* 469 F.3d at 909-10 (quotation and alterations omitted).

Moreover, although the court's reasons reflect a limited consideration of certain § 3553(a) factors, namely § 3553(a)(1), (2)(A), and (2)(C), the court's express disregard for one factor, § 3553(a)(6), renders its application of § 3553(a) unreasonable. *See* 18 U.S.C. § 3553(a)(6) (requiring a sentencing court to consider "the need to avoid unwarranted sentencing disparities among [similar] defendants"); *see also Cage,* 451 F.3d at 595 (explaining that the district court's application of particular § 3553(a) factors was unreasonable because of the "weight the district court placed on them"). As noted above, one of the primary purposes of the Guidelines is to promote uniformity in sentencing. *See Kristl,* 437 F.3d at 1054. Although the court recognized this purpose, it nonetheless refused to consider § 3553(a)(6), stating that the "problem with uniform[ity] in sentencing is we don't have uniform defendants." While this may be true, a substantial divergence from the Guidelines requires compelling reasons that distinguish the particular defendant and conduct at issue from the ordinary defendant contemplated by the advisory Guidelines range. In this case, Mr. Hildreth's criminal history and characteristics, as well as the nature of the offense, were already part of the calculation of the sentence under the Guidelines. *See United States v. Shaw,* 471 F.3d 1136, 1141 (10th Cir.2006) (noting that "an

adjustment based on a factor that was already built into the guideline calculation may challenge the overall uniformity of sentences"). Hence, the court's substantial variance threatens to undermine uniformity in sentencing and does not accord adequate weight to the statutory factors under § 3553(a). We therefore conclude that Mr. Hildreth's sentence is unreasonable.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the District Court's decision denying the motion for judgment of acquittal, VACATE Mr. Hildreth's sentence, and REMAND for resentencing.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v. Crim. Action
No.05-10016-01-WEB

SCOTT HILDRETH,

Defendant.

Memorandum and Order

Defendant Scott Hildreth was charged in a Superseding Indictment with two counts of knowingly possessing a machinegun, in violation of 18 U.S.C. § 922(o). Doc. 11. The matter was tried to a jury, which returned a verdict of guilty as to Count One and not guilty as to Count Two. Doc. 31. The matter is now before the court on defendant's motion for judgment of acquittal. Doc. 34. Although defense counsel has requested oral argument, in view of the applicable legal standards and the evidentiary record the court concludes oral argument would not assist in deciding the issues presented.

I. *Summary of Motion.*

Defendant argues that judgment of acquittal should be granted for two reasons. First, he contends the defense of entrapment was established as a matter of law because the Government failed to prove that he was predisposed to commit the offenses. He argues "in

a case such as the instant one where the Government has induced (indeed originated) criminal conduct, and the defense of entrapment is at issue, the prosecution must prove beyond a reasonable doubt that the Defendant was disposed to possess machineguns *prior* to first being approached by Government agents, *Jacobson* v. *United States*, 503 U.S. 540 (1992)." Def. Mem. at 2. He believes the evidence "failed to establish that Defendant had the predisposition to possess a machinegun *prior* to being contacted, misled and lured into the situation orchestrated and choreographed by the Government agents." *Id.* "At best," he argues, "the evidence presented by the Government is that Mr. Hildreth had various generalized interests and inclinations regarding firearms, ..." *Id.* at 3. As for his second argument, defendant contends the jury's verdict is inconsistent as a matter of law. He asserts that the defense of entrapment was the only defense submitted to the jury, and that the jury's finding on Count Two necessarily means it found there was entrapment as to that offense. This is inconsistent with the finding of guilt on Count One, he maintains, because the alleged possession of the both machineguns was part of a single, inseparable transaction, with possession occurring at the same time and same place. As such, he argues, the defense of entrapment must be applied to Count One as a matter of law. *Id.* at 3-4 (citing *United States* v. *Beal*, 961 F.2d 1512 (10th Cir. 1992)).

In its response, the Government argues there was sufficient evidence for the jury to find the defendant was predisposed to commit the offense, and it outlines the evidence at trial pertaining to predisposition. It further argues that the *Beal* case

relied upon by defendant is distinguishable because the defendant in the instant case did not rely solely on the issue of entrapment, but instead raised several challenges to the Government's proof.[1] 1 It thus contends the defendant's motion should be denied.

II. *Discussion.*

For entrapment to exist, two elements must exist: first, government agents must have induced the defendant to commit the offense; and second, the defendant must not have been otherwise predisposed to commit the offense, given the opportunity. *United States* v. *Nguyen*, 413 F.3d 1170, 1178 (10th Cir. 2005). "Inducement" is governmental conduct which creates a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense. *Id.* Under Tenth Circuit law, evidence that a government agent solicited, requested, or approached the defendant to engage in criminal conduct, standing alone, is insufficient to constitute inducement. *Id.* Nor is inducement established from the mere fact that a

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[1] In support of its argument, the Government cites certain statements allegedly made by jurors in a post-verdict interview. Doc. 36 at 1-2. For purposes of the instant motion, the court disregards any such statements. *Cf.* Fed.R.Evid. 606(b) (outlining circumstances and methods in which inquiry into verdict may be made). No suggestion has been made that any extraneous prejudicial information or improper outside influence affected the jury's verdict. Accordingly the court concludes that any evidence of juror statements relating to how the verdict was arrived at should be disregarded. As the court notes below, defendant's argument that the verdict was inconsistent or unsupportable is rejected based upon the fact that a rational jury could find from the evidence presented at trial that the Government met its burden as to the elements of Count One but not Count Two.

government agent initiated the contact with the defendant or proposed the crime. *Id.* "Predisposition," by contrast, refers to a defendant's inclination to engage in the crime charged, i.e., whether he was ready and willing to commit the crime. *Id.*

In *United States* v. *Young*, 954 F.2d 614 (10th Cir. 1992), the court noted:

> The defense of entrapment is generally an issue for the jury and not for the court. *Mathews* v. *United States*, 485 U.S. 58,63, 108 S.Ct. 883, 886, 99 L.Ed.2d 54 (1988). If there is any conflicting evidence upon which a jury could find no entrapment, the issue must be determined by the jury. *See United States* v. *Fadel*, 844 F.2d 1425, 1430 (10th Cir.1988); *Martinez* v. *United States*, 373 F.2d 810, 812 (10th Cir.1967). Entrapment will be found as a matter of law by a court only if all the elements of entrapment are uncontradicted. *Fadel*, 844 F.2d at 1430; *United States* v. *Ortiz*, 804 F.2d 1161,1164 (10th Cir.1986).

See also United States v. *Garcia*, 182 F .3d 1165, 1168 (10th Cir. 1999) (When a jury has found that no entrapment existed, we can alter that finding on legal grounds only 'where the holding should be made without choosing between conflicting witnesses nor judging credibility . . . . Accordingly, we review only whether sufficient evidence exists to support the jury's verdict' "). Stated otherwise, "[a] claim of entrapment as a matter of law requires the defendant to show that 'there is undisputed testimony which shows

conclusively and unmistakably that an otherwise innocent person was induced to commit the act.'" *United States* v. *Duran*, 133 F.3d 1324, 1335 (10th Cir. 1998) [citations omitted]. In determining the issue, the court must consider the evidence in the light most favorable to the government, drawing all reasonable inferences in favor of the prosecution. *Id.* "A defendant is not entitled to a claim of entrapment as a matter of law if the government has presented any evidence to contradict the entrapment defense." *Id.* at 1335-36.

In light of these governing legal standards, the court must reject defendant's argument that the evidence established entrapment as a matter of law. A jury could rationally find from the evidence beyond a reasonable doubt that the defendant was not entrapped. Notwithstanding defense counsel's vociferous denunciation of the methods used by the undercover agents in this case, in reality the agents did little more than offer the defendant an opportunity to commit the offense. This was not a case like *Jacobson* where agents engaged in constant solicitations over a period of years, a pattern of conduct that was designed to and arguably could wear down the resistance of an otherwise law-abiding citizen. *Cf. Jacobson*, 503 U.S. at 553 ("The evidence that petitioner was ready and willing to commit the offense carne only after the Government had devoted 2 1/2 years to convincing him that he had or should have the right to engage in the very behavior proscribed by law."). Indeed it was undisputed in *Jacobson* that the Government had induced the defendant to commit the crime. *Id.*, 503 U.S. at 549, n.2. Here, by contrast, the majority of contacts between the government agents and the defendant

consisted of leaving simple messages, and there was little if any evidence that government agents cajoled, hectored or pressured the defendant into engaging in unlawful transactions towards which he was not predisposed. In fact, there was ample evidence at trial of the defendant's predisposition to commit the offense. Predisposition may be shown by evidence of similar prior illegal acts or it may be inferred from a defendant's desire for profit, his eagerness to participate in the transaction, his ready response to the government's inducement offer, or his demonstrated knowledge or experience in the criminal activity. *United States* v. *Garcia*, 182 F.2d 1165, 1168-69 (10th Cir. 1999). And "although *Jacobson* v. *United States* ... requires that the defendant's predisposition be viewed at the time the government agent first approached the defendant, *inferences about that predisposition may be drawn from events occurring after the two parties came into contact.*" *Garcia*, 182 F.3d at 1169 (emphasis added). As the Government points out in its brief, there was evidence at trial that prior to the alleged offense the defendant purchased and sold a firearm which he thought might be a machinegun at a Tulsa gun show; that he sold a firearm to an undercover officer and eagerly demonstrated to him how to place nickels behind the trigger to make it fire as an automatic; and that he bragged to the officer about how he had fired automatic weapons in the past. Additionally, the defendant's actions in connection with the two transactions involving undercover officer Dee Stahl could reasonably be viewed by a jury as showing defendant's readiness and willingness to commit the offense. The defendant readily pursued the agent's

proposed sale of the machinegun and other fireanns, making a prompt bid and attempting to talk her out of her stated plan of taking the guns back to Kansas City so her brother-in-law could examine them. His statements also indicated knowledge concerning the illegality of possessing a machinegun such as the AKM without an appropriate license.

"'[T]he factfinder is traditionally in the better position to evaluate conflicting evidence and determine credibility;' and, therefore, conflicting evidence as to a defendant's predisposition precludes a finding of entrapment as a matter of law." *United States* v. *Lampley*, 127 F.3d 1231, 1242 (10th Cir. 1997). Given the evidence and the reasonable inferences arising there from that support a finding of predisposition, the court cannot conclude as a matter of law that the defendant was entrapped.

Defendant's second argument - that the jury's verdict was legally inconsistent - suffers from an erroneous assumption that the only possible ground for the jury's not guilty finding on Count Two was the defense of entrapment. But at trial the defense challenged whether defendant's possession of the machinegun charged in Count Two was done "knowingly" and whether that firearm was in fact a machinegun. Defendant testified that when he "field-tested" the RPB MI0 several days before the actual purchase, his examination indicated that the gun would function as a semi-automatic rather than an automatic. The defense also pointed out that the MI0 had originally been manufactured as a semi- automatic weapon and that it had no visible external indication of being an automatic. The defense thus denied that

the defendant had any knowledge the weapon was a machinegun. Additionally, defendant challenged the Government's evidence that the MI0 was in fact a machinegun at the time of the offense. The defense challenged the testimony of one of the agents who said he had fired the M10 before the date of the offense and that it had fired as an automatic. All of this was in contrast to the evidence relating to the Polish AKM that was the subject of Count One. Defendant conceded in his testimony that when he examined the AKM he knew it was an automatic weapon. Clearly, the issue of entrapment was not the only issue the jury decided in this case. *Cf. United States* v. *Beal*, 961 F.2d 1512, 1513 (10th Cir. 1992) ("The entrapment defense was the only issue submitted to the jury,..."). The elements of knowledge and whether the firearm was a machine gun were both challenged as to Count Two, but not as to Count One. The *Beal* case is thus clearly distinguishable, despite the fact that Mr. Hildreth possessed both guns at the same time and as part of the same transaction. *Cf. Beal*, 961 F.2d at 1517 ("There is nothing contained in the government's proof which provides a factual distinction between defendant's manifested state of mind during those [two] transactions."). Under the circumstances, defendant's argument that the verdict constitutes an inconsistent application of the entrapment defense amounts to nothing more than speculation. Accordingly, it provides no basis for overturning the jury's decision and entering a judgment of acquittal.[2]

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[2] Even if the verdict had somehow been inconsistent, it is doubtful the court would have the power to grant defendant's motion. See *United States* v. *Powell*, 469 U.S. 57,66 (1984) ("The

III. *Conclusion.*

Defendant's Motion for Judgment of Acquittal (Doc. 34) is DENIED. IT IS SO ORDERED this 24th Day of October, 2005, at Wichita, Ks.

s/Wesley E. Brown
Wesley E. Brown
U.S. Senior District Judge

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fact that the inconsistency may be the result of lenity, coupled with the Government's inability to invoke review, suggests that inconsistent verdicts should not be reviewable."). Along these lines, the court notes that the judgment of acquittal granted in *Beal* was not based upon inconsistency in the verdict as such, but rather was based upon a finding that the Government had failed as a matter of law to prove the defendant had not been entrapped. *See Beal*, 961 F.2d at 1516 ("In ruling on the motion for judgment of acquittal, the trial court held, as a matter of law, the defendant was entrapped on both counts.").